Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	CG Docket No. 18-152
	)	
Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's *ACA International Decision*	)	CG Docket No. 02-278
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS OF THE STUDENT LOAN SERVICING ALLIANCE; NAVIENT CORP.; NELNET SERVICING, LLC; AND PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY

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TABLE OF CONTENTS

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	)	
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I. INTRODUCTION AND SUMMARY.

The Student Loan Servicing Alliance ("SLSA"); Navient Corp. ("Navient"); Nelnet Servicing, LLC ("Nelnet"); and the Pennsylvania Higher Education Assistance Agency ("PHEAA")[1] respectfully submit these Reply Comments in response to the Federal Communication Commission ("FCC" or "Commission") Consumer & Governmental Affairs Bureau's *Public Notice* in the above-captioned proceedings. As discussed below, the record demonstrates that the FCC should confirm that federal and state contractors are not subject to liability under the Telephone Consumer Protection Act ("TCPA") when they comply with the

[1] Great Lakes Higher Education Corp. ("GLHEC") participated in prior filings on behalf of its former affiliate, Great Lakes Education Loan Servicing Inc. ("GLELSI"). GLHEC sold its interest in GLELSI to Nelnet effective February 1, 2018.

government's directions and should reconsider the rules adopted in the *2016 Federal Debts Order*.[2]

Many commenters agree that the Commission should confirm that the TCPA does not apply to contractors who call on behalf of federal and state governments and comply with the government's validly-conferred instructions. The Commission correctly interpreted the term "person" to exclude the federal government and its contractors in the 2016 *Broadnet* decision, although it should not have applied an agency standard.[3] It is also well-established that federal contractors, such as federal student loan servicers, can enjoy derivative immunity regardless of agency status. Meanwhile, the *Broadnet* decision and Bipartisan Budget Act of 2015 ("BBA") amendments to the TCPA do not conflict, and the legal principles and policy considerations on which *Broadnet* rests also apply to state governments and their contractors.

Many commenters also agree that the Commission should reconsider the rules adopted in the *2016 Federal Debts Order* that are arbitrary, capricious, or an abuse of discretion, and they support our pending Petition for Reconsideration.[4] These commenters state, for example, that the rules adopted in 2016 would thwart the intent of Congress and render the new exemption meaningless. Meanwhile, the only commenter who supports the federal debt collection rules adopted in 2016 and engages with the issues raised in our Petition fails to address the present record, supports its positions with unsubstantiated rhetoric and anecdotes, and mischaracterizes federal student loan servicers. No party even attempts to defend the FCC's prior interpretation of its jurisdiction under the BBA exemption.

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[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 31 FCC Rcd. 9074 (2016) ("*2016 Federal Debts Order*").

[3] *Broadnet et al.*, Declaratory Ruling, 31 FCC Rcd. 7394 (2016) ("*Broadnet*").

[4] *See* Great Lakes Higher Education Corp. *et al.*, Petition for Reconsideration, CG Docket No. 02-278 (filed Dec. 16, 2016) ("Petition for Reconsideration").

II. THE RECORD DEMONSTRATES THAT THE TCPA DOES NOT APPLY TO CONTRACTORS THAT COMPLY WITH GOVERNMENT DIRECTIONS.

A. The Commission Correctly Interpreted the Term "Person" to Exclude Federal Contractors.

As discussed in our comments,[5] the Commission's *Broadnet* decision appropriately found that contractors acting on behalf of the federal government are not "persons" under Section 227(b)(1) of the TCPA. The definition of "person" is found in the Communications Act's (the "Act") general definition section, Section 153(39), and the specific definitions apply as stated "unless the context otherwise requires[.]"[6]

The term "person" is used throughout the Act.[7] In the context of the TCPA, the Commission must define the term consistent with the undisputed conclusion that a "person" does not include the federal government. The Commission properly concluded in *Broadnet* that, despite the entities enumerated under the definition of "person," excluding the government from the definition of person while extending the term to cover federal contractors would frustrate Congress's clear intent and lead to an absurd result.[8] Simply put, "[t]he fundamental nature of the call from a TCPA liability perspective should not change simply because the government has chosen to direct a third party to call the public on its behalf and pursuant to its continuing oversight."[9] The federal government uses private contractors to carry out important communications with citizens, and the government has the right to delegate such functions.

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[5] *See* Comments of the Student Loan Servicing Alliance *et al.*, CG Docket Nos. 02-278, 18-52, at 3-8 (filed June 13, 2018).

[6] *Broadnet* n. 79 (citing 47 U.S.C. §153). Under Section 153 (39), "the term 'person' includes an individual, partnership, association, joint-stock company, trust, or corporation."

[7] *See, e.g.*, 47 U.S.C. § 204(a)(1); §§ 206, 223, 231, 503, 508.

[8] *Broadnet*, n. 29 (concluding that the context warranted exclusion because "[i]n the absence of such a finding, many activities of the federal government would effectively be prohibited or restricted").

[9] Comments of the National Opinion Research Center, CG Docket Nos. 02-278, 18-152, at ii (filed June 13, 2018).

The National Consumer Law Center *et al*. ("NCLC") and Cunningham/Moscovitz claim that the Commission inappropriately looked outside the text of the statute in violation of the Supreme Court's opinion in *Hubbard v. United States*, which, they assert, prohibits the FCC from considering any "context" other than the text of the statute and other related legislation.[10] Even if the Commission were so bound, it would only need to look at the text of the Act to conclude that the definition of the term "person" in Section 153 must "yield" when defining person in the context of Section 227(b)(1).[11] In this context, it follows that those acting on behalf of the federal government must also be excluded from the definition of the term "person," otherwise Congress's intent to protect federal actions would be thoroughly frustrated. Consistent with *Hubbard*, the Commission "analyz[ed] a statutory term's context" to "determine when a presumptive definition must yield."[12]

B. It Is Well-Established That Derivative Immunity Extends to Federal Contractors Regardless of Agency Status.

Excluding federal contractors from TCPA liability is also warranted by the derivative immunity doctrine. NCLC asserts that no such doctrine exists or at least was not adopted in the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez,*[13] which the Commission relied on in support of its ruling in *Broadnet*.[14] NCLC is just flat wrong, as demonstrated by the recent Fourth Circuit opinion in *Cunningham v. General Dynamics Information Technology, Inc.,*[15] which NCLC failed to cite. *Cunningham* not only makes clear that derivative immunity exists,

[10] 514 U.S. 695 (1995); *see also* Comments of NCLC *et al.*, CG Docket Nos. 02-278, 18-152 at 43-45 (filed June 13, 2018) ("NCLC Comments"); Comments of Craig Cunningham and Craig Moskowitz, CG Docket Nos. 02-278, 18-152, at 3-4 (filed June 13, 2018).

[11] *See id*. at 701 (concluding that "a presumptive definition must yield" when the context requires).

[12] *Id*.

[13] *See* NCLC Comments at 43-45; *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663 (2016).

[14] *Broadnet* ¶¶ 9, 10, 20, 21.

[15] 888 F.3d 640 (4th Cir. 2018).

but the Fourth Circuit also applied it in that case to preclude liability for a federal contractor under the TCPA without considering the contractor's agency status. *Cunningham*, as did the Commission, relied heavily on *Campbell-Ewald* and *Yearsley*.[16]

In *Yearsley*, the Supreme Court considered whether a private contractor could be liable for damage resulting from a government-authorized construction project. The Supreme Court explained that "it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."[17] Applying this test, the Court concluded that the contractor was not liable for the damage because it acted pursuant to the government's valid authorization.[18] Immunity applies "[w]here the government has directed a contractor to do the very thing that is the subject of the claim."[19] *Yearsley* and its progeny, including *Campbell-Ewald*, do not require a traditional agency relationship with the government to enjoy immunity.[20]

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[16] The attorney representing Cunningham in that Fourth Circuit case filed comments in the proceeding raising the arguments that were rejected by the Fourth Circuit.

[17] *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20-21 (1940).

[18] *Id.* at 21-22.

[19] *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (citing *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)); *see, e.g., Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 206-07 (5th Cir. 2009) (affirming dismissal of claims against a contractor where the plaintiff did not allege that the contractor exceeded its authority or that Congress did not validly confer such authority); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) ("As a result, courts have extended derivative immunity to private contractors, 'particularly in light of the government's unquestioned need to delegate governmental functions.'" (quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996))); *Myers v. United States*, 323 F.2d 580, 583 (9th Cir.1963) (applying *Yearsley* and concluding that the contractor was not liable for work it performed pursuant to a federal contract); *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 266 F. Supp. 3d 1, 47 (D.D.C. 2017) (applying *Campbell-Ewald* and *Yearsley* and concluding that the plaintiffs' claims must be dismissed because the company is immune from suit as a government contractor); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, No. MDL 2179, 2016 WL 614690, at *9 (E.D. La. Feb. 16, 2016) (citing *Yearsley* for the rule that "[p]rivate entities are entitled to [derivative] immunity when they perform work pursuant to the authorization and direction of the federal government and the acts of which Plaintiffs complain fall within the scope of those directives").

[20] *See, e.g., Ackerson*, 589 F.3d at 205.

Instead, the Supreme Court has focused on whether the contractor acted pursuant to validly conferred government authority.

Other courts applying *Yearsley* likewise have not imposed an agency requirement.[21] For example, in *Cunningham*, the Fourth Circuit confirmed that a government contractor "is not subject to suit if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power."[22] In that case, Congress had conferred authority on the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services ("CMS") to call potential users of the Affordable Care Act ("ACA"), and CMS contracted with the defendant to make those calls. In addressing the test's first step, the court determined that the contractor adhered to the terms of its contract.[23] The Court rejected the argument that the contract had been violated because it contained a clause requiring adherence to applicable laws, which, according to the plaintiff, precluded calls without consent.[24] The court concluded that the contractor did not violate the contract by failing to obtain consent for the numbers called because the contract authorized the contractor to make the calls.[25]

[21] *Id.* at 206 (collecting cases); *see also Myers*, 323 F.2d at 583 (citing *Yearsley* and concluding, without discussing agency, that "[t]o the extent that the work performed by [the contractor defendant] was done under its contract with the Bureau of Public Lands, and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants").

[22] *Cunningham*, 888 F.3d at 646 (quoting *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014)). The Fourth Circuit explained that "[a]uthorization is 'validly conferred' on a contractor if Congress authorized the government agency to perform a task and empowered the agency to delegate that task to the contractor, provided it was within the power of Congress to grant the authorization." *Id.* at 646-47 (citing *Yearsley*, 309 U.S. at 20).

[23] *Id.* at 647-48.

[24] *Id.* at 647.

[25] *Id.* at 647-48.

The Fourth Circuit next concluded that the government "validly conferred" authorization because the contractor made the calls "pursuant to CMS's statutory mandate to administer the ACA and keep applicants informed about their eligibility for enrollment in a qualified health plan."[26] Although the plaintiff argued that the government cannot "validly confer" the authority to violate the law—*i.e.*, the TCPA—the court rejected this argument as a misunderstanding of *Yearsley*'s second prong. "The question is not whether informing applicants of their enrollment eligibility violated the law," the court explained, "but rather whether Congress had the authority to assign [the contractor] to complete that task."[27] The court reasoned that "[t]he purpose of *Yearsley* immunity is to prevent a government contractor from facing liability for an alleged violation of law, and thus, it cannot be that an alleged violation of law per se precludes *Yearsley* immunity."[28]

Derivative immunity is a valid and vibrant doctrine. Moreover, the standards for its application are more than sufficiently clear to incorporate the doctrine into the FCC's TCPA regulatory framework, which should expressly exempt contractors that comply with contractual obligations validly conferred.

C. Federal Student Loan Servicers Make Calls Pursuant to the Government's Validly Conferred Authority.

Like the contractor in *Cunningham,* federal student loan servicers make calls to borrowers pursuant to the government's validly conferred authority. Federal statutes expressly direct the Secretary of Education to "award contracts for origination, servicing, and collection"

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[26] *Id.* at 648.

[27] *Id.*

[28] *Id.* at 648-49.

of federal student loans.[29] The Department of Education has made clear that the government and the loan servicers share the same important interests: "the loan servicers are acting pursuant to a contract with the Federal government, and the servicers stand in the shoes of the Federal government in performing required actions under the Direct Loan Program." [30] The Department of Education has further emphasized that "there is no question that the 'imposition of liability on Government contractors will directly affect the terms of Government contracts,' at the very least by raising the price of such contracts, and 'the interests of the United States will be directly affected.'"[31] Therefore, the TCPA should not apply to federal student loan servicers when they place such calls.

D. The BBA Amendments and *Broadnet* Do Not Conflict.

As noted in our initial comments, *Broadnet* and the BBA rules do not completely overlap and are consistent with each other.[32] Other commenters concur. RTI International ("RTI"), for example, states that *Broadnet*'s "clarification is based on the relationship between the caller and the federal government, while the Budget Act exemption is based on the purpose of the call."[33] RTI also correctly notes that "[n]ot every call to collect a debt owed to or guaranteed by the federal government is made by an agent of the federal government acting within the scope of her

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[29] 20 U.S.C. § 1087f(a)(1). Federal regulations require student loan servicers to undertake certain due diligence activities in servicing Direct and FFELP loans, including engaging in efforts to obtain payment from delinquent borrowers, informing delinquent borrowers of repayment options and the consequences of default, and using effective skip-tracing techniques to locate the borrower's or endorser's current address or phone number. *See, e.g.*, 34 C.F.R. § 682.411.

[30] Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619-01 (Mar. 12, 2018).

[31] *Id.* at 10621 (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988)).

[32] Comments of the Student Loan Servicing Alliance *et al.*, CG Docket Nos. 02-278, 18-52, at 7-8 (filed June 13, 2018).

[33] Comments of Research Triangle Institute d/b/a RTI International, CG Dockets No. 02-278, 18-152 at 7 (filed June 13, 2018) ("RTI Comments").

agency, and not every call from an agent of the federal government acting within the scope of her agency is to collect a federal debt."[34] In other words, the BBA applies only to collectors of federal debt whereas *Broadnet* applies to all types of federal contractors.

NCLC nevertheless asserts that "[t]he only callers who would possibly be making calls to collect debts owed to or guaranteed by the United States would either be the agencies of the government or its contractors."[35] This too is just plain wrong. Companies servicing privately-held but federally-guaranteed loans do not act pursuant to contracts with the federal government and thus must rely on the BBA amendments for protection from the overzealous TCPA-plaintiffs' bar. As the National Council of Higher Education Resources ("NCHER") put it, the fact that privately-held but federally-guaranteed loans are not covered by *Broadnet* "alone is reason to grant the Petition for Reconsideration."[36]

In enacting the BBA amendments, Congress clearly believed that all types of calls to collect federal debts should be exempt from the TCPA's prior express consent restrictions—regardless of whether the debt is serviced by a government contractor. This makes sense because, notwithstanding the nature or relationship of the debt servicer or collector, the federal government is ultimately responsible for the debt. Accordingly, both *Broadnet* and the BBA amendments are critically important.

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[34] *Id.*

[35] NCLC Comments at 42.

[36] Comments of the National Council of Higher Education Resources, CG Docket Nos. 02-278, 18-152 at 7 (filed June 13, 2018) ("NCHER Comments").

E. State Governments and Their Contractors Should Be Exempt From TCPA Liability.

Commenters agree that the FCC should confirm that state governments and contractors that conform with state directives are exempt from TCPA liability.[37] Some go further and ask the FCC to extend the clarification to local governments as well,[38] and we concur. Commenters point out that "[s]tate and local governments have equally valid and urgent reasons to contact their citizens"[39] yet, along with their contractors, remain vulnerable to potentially crippling TCPA class action litigation "that divert[s] tax dollars away from serving the public."[40] These commenters cite numerous court decisions concluding that state and local governments should not be considered "persons" subject to a statute absent clear congressional intent to the contrary.[41] There is no evidence in the TCPA's text or legislative history that Congress intended to restrict the calling activities of any level of government.[42] Meanwhile, considering that the federal government is indisputably immune from TCPA liability, it would be only a small and logical step to extend the Commission's prior clarification to state and local governments.[43]

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[37] *See* Comments of Broadnet Teleservices LLC, CG Docket Nos. 02-278, 18-152 at 9 (filed June 13, 2018) ("Broadnet Comments"); RTI Comments at 6-7.

[38] *See id*.

[39] RTI Comments at 6.

[40] *Broadnet*, Statement of Commissioner Michael O'Rielly.

[41] *See, e.g.*, RTI Comments at 6; Broadnet Comments at 7-8.

[42] *See, e.g.*, Broadnet Comments at 9. Even NCLC recognizes that courts have held that state and local governments are immune from TCPA liability. *See* NCLC Comments at 49. NCLC also cites cases holding state and local contractors liable under the TCPA. *See id*. at 48-49. These cases clearly speak to the significant risk contractors face when carrying out government directives.

[43] *See* Broadnet Comments at 9 ("[T]he Commission can and should find that state and local governments are not 'persons' for purposes of the TCPA's restriction on autodialed and prerecorded calls—a finding entirely consistent with the Commission's reasoning in the *Broadnet Declaratory Ruling*—and should ensure that the TCPA does not apply to the service providers working on their behalf.").

III. THE COMMISSION SHOULD RECONSIDER THE RULES ADOPTED IN THE *2016 FEDERAL DEBTS ORDER.*

A. The Record Demonstrates Broad Support for Reconsidering the Rules Adopted in the *2016 Federal Debts Order*.

Many commenters agree that the FCC should reconsider the rules adopted in the *2016 Federal Debts Order*. For example, ACA International observes that the FCC's 2016 approach "has so many limitations and confusing requirements that it fails to achieve the main objective of the law, and in actuality flies in the face of the Congressional directive to facilitate the collection of debts owed to the government."[44] NCHER warns that the three-call-attempt-per-30-day limit and the potential liability for reassigned number calls "thwart[] the intent of Congress" and render the BBA amendments meaningless.[45] The Coalition of Higher Education Assistance Organizations echoes that three-call-attempts per 30 days is too low and observes that adopting a separate standard than the Bureau of Consumer Financial Protection "would be confusing and an opportunity for potential unfair liability."[46] The Consumer Bankers Association points out that the limits the FCC adopted in 2016 are inconsistent with both the record in the federal debts proceeding and other federal agencies' legal mandates.[47]

These comments are consistent with the record in the Commission's federal debts proceeding, which demonstrated that the rules adopted in 2016 would frustrate Congress's intent and harm student loan borrowers.[48] Meanwhile, as discussed below, no commenter provides compelling legal or policy reasons to justify the FCC's 2016 approach.

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[44] Comments of ACA International, CG Dockets Nos. 02-278, 18-152 at 10 (filed June 13, 2018).

[45] NCHER Comments at 7.

[46] Comments of the Coalition of Higher Education Assistance Organizations, CG Docket Nos. 02-278, 18-152 at 5 (filed June 13, 2018).

[47] Comments of the Consumer Bankers Association, CG Docket No. 18-152 at 6 (filed June 13, 2018).

[48] *See, e.g.*, Petition for Reconsideration at 2-4.

B. NCLC's Recycled Comments Fail to Address the Present Record.

Only one filer, NCLC, submitted comments that support the *2016 Federal Debts Order* and engage with the issues raised in our Petition for Reconsideration as requested by the Public Notice.[49] Yet NCLC offers almost no new points for the Commission to consider. In fact, much of NCLC's filing appears to have been cut-and-pasted in its entirety from the Opposition NCLC filed in February 2017.[50]

Many of the points raised by NCLC were already refuted. For example, our Consolidated Reply from 2017 explains, among other things, that:

- NCLC mischaracterizes and ignores the data in the record, which demonstrate that, absent additional calls, many federal student loan borrowers will not be reached until it is too late;[51]
- NCLC incorrectly dismisses the value of additional live contacts with federal student loan borrowers;[52]
- NCLC grossly overestimates the potential impact to low-income consumers;[53] and
- NCLC conflates calls by scammers and unwanted telemarketing calls, which Congress passed the TCPA to protect against, with calls placed by student loan

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[49] *See Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, Public Notice, DA 18-493 at 5 (rel. May 14, 2018). Other filers, such as Consumer Action and Consumers Union, generally assert that the FCC should finalize "strong" rules or that Congress should remove the new exemptions without engaging with the issues raised in our Petition for Reconsideration. *See* Comments of Consumer Action, CG Docket Nos. 02-278, 18-152 at 2 (filed June 11, 2018); Comments of Consumers Union, CG Docket Nos. 02-278, 18-152 at 4-5 (filed June 13, 2018).

[50] *Compare, e.g.*, NCLC Comments at 55-59 *with* Opposition of National Consumer Law Center *et al.* to Petition for Reconsideration Submitted by Great Lakes Higher Education Corp. *et al*., CG Docket No. 02-278 at 7-10 (filed Feb. 1, 2017) (discussing the limit on the number of calls, limit on call attempts, and calls to persons other than the debtor).

[51] Consolidated Reply of Great Lakes Higher Education Corp. *et al.*, CG Docket No. 02-278 at 3-4 (filed Feb. 13, 2017).

[52] *Id*. at 4.

[53] *Id*. at 5.

> servicers to collect federal debt, for which Congress passed a targeted exemption specifically to protect.[54]

NCLC's filing does not address any of these points, even though they have been part of the record in the FCC's federal debts proceeding for nearly a year and a half. Indeed, NCLC's filing does not even mention or reference our Consolidated Reply. These points were wrong when NCLC initially raised them, and they are even more unreasonable now.

C. NCLC Mischaracterizes Federal Student Loan Servicers.

Federal student loan servicers such as Navient, Nelnet, and PHEAA are among the businesses that are "trying to do the right thing and play by the rules."[55] We help student loan borrowers navigate the increasingly complex array of repayment options and avoid penalties that are set by the federal government and can be extraordinarily swift, harsh, and long-lasting. We are not, as NCLC claims, "harassing debtors and non-debtors relentlessly."[56] Nothing could be further from the truth. Indeed, servicers have no incentive to place unnecessary calls, including calls to wrong or reassigned numbers.[57] When it comes to helping student loan borrowers, placing too few calls is far worse than placing too many—which Congress recognized when it passed the BBA. Live conversations are the best way to help student loan borrowers get out of delinquency and avoid defaulting on their federal debts.

The record reflects comments from a wide array of organizations that have highlighted the important role that student loan servicers play in keeping at-risk borrowers engaged and out

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[54] *Id*. at 9-10.

[55] *See The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 114th Cong. 2 (statement of Sen. John Thune, Chairman, S. Comm. on Commerce, Science, & Transportation).

[56] NCLC Comments at 50.

[57] NCLC cites to cases of student loan servicers making allegedly excessive debt collection calls in an attempt to paint servicers as bad actors. For example, it cites a case in which Nelnet unknowingly made calls to a reassigned number in an effort to reach the borrower. NCLC Comments at 58-59. Evidence in that case showed that the plaintiff deliberately amassed unanswered messages in order to foster litigation.

of delinquency—which helps borrowers and taxpayers alike.[58] Many provided evidence and data demonstrating the positive outcomes of telephone outreach and how live contact with borrowers is critical to achieving Congress's objectives.[59] These data-driven comments have met only with unsubstantiated rhetoric and anecdotes from the parties who prefer a different outcome.

Congress adopted the TCPA in 1991 to protect individuals' privacy rights while also permitting legitimate business interests and commercial freedom of speech.[60] Congress had good reasons to do so, but preventing federal student loan servicers from helping student loan borrowers avoid delinquency and default was not one of them. Congress accordingly amended the TCPA in 2015, and the BBA amendments open the door for federal student loan servicers to help borrowers while supporting responsible use of federal taxpayer dollars. We encourage the FCC to keep these goals in mind as it modifies the rules adopted in the *2016 Federal Debts Order*.

D. No Party Even Attempts to Defend the FCC's Interpretation of its Jurisdiction Under the Exemption.

Tellingly, no party even attempts to defend the FCC's interpretation of its jurisdiction under the amended TCPA as extending to calls that are placed by non-"persons." Chairman Pai stated, and Commissioner O'Rielly has reiterated, that this approach "is unlawful and makes a dog's breakfast of the TCPA."[61] As our Petition for Reconsideration explains, the interpretation

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[58] *See, e.g.*, Comments of the National Council of Higher Education Resources, CG Docket No. 02-278 at 11-13 (filed June 6, 2016); Letter from James T. Farha, President, Oklahoma Student Loan Authority to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2 (filed June 3, 2016).

[59] *See, e.g., id*.

[60] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9).

[61] *2016 Federal Debts Order*, Pai Dissent; O'Rielly Dissent; *see also* Petition for Reconsideration at 16-21.

cannot be squared with the statute's text,[62] contradicts Congress's intent,[63] leads to absurd consequences,[64] and ignores sovereign immunity.[65] Even NCLC observes that it is a "rather absurd and strained reading of the Budget Act."[66]

IV. CONCLUSION.

The record reflects broad agreement that the FCC should revise the *Broadnet* decision and rules adopted in the *2016 Federal Debts Order* to support government policies that help federal student loan borrowers receive important, time-sensitive, non-marketing information. Congress specifically amended the TCPA for the first time in years to allow federal debt calls without prior express consent. The Commission should revise its rules and confirm the limits on the TCPA's reach as discussed above to avoid thwarting Congress's intent and allow federal student loan servicers to help borrowers manage delinquency and avoid default.

[62] *See* Petition for Reconsideration at 16-18.

[63] *See id*. at 18-19.

[64] *See id*. at 19-21.

[65] *See id*.

[66] NCLC Comments at 61 (citing paragraphs 61-63 of the *2016 Federal Debts Order*).

Respectfully submitted,

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